321 U.S. # 26
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943

HERBERT OTTO SCHUCHARDT,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

No. 573

Petition for Writ of Certiorari to the Supreme Court of the State of Michigan and Supporting Brief

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HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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Petition for Writ of Certiorari to the Supreme Court of the State of Michigan and Supporting Brief

To the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Herbert Otto Schuchardt respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of the State of Michigan denying his application for leave to appeal from the judgment and sentence of the Circuit Court of Midland County, State of Michigan.

SUMMARY STATEMENT OF MATTERS INVOLVED

Petitioner, a naturalized citizen of German birth and a citizen and resident of the County of Milwaukee and State of Wisconsin, was arrested at the City of Midland,

Midland County, Michigan on January 15, 1943 at 1:00 P.M. He was not taken before an examining magistrate but was kept in a room from the time of his arrest until 5:00 P.M. During that time he was continuously interrogated by the assistant prosecuting attorney of Midland County, the sheriff and other officers (R. 7). He was not permitted to obtain a lawyer, and was informed that he would not be permitted to leave the room until he had signed a confession, and was intimidated and threatened to a point where he was not able to exert his own will power and was persuaded and induced by Ira H. Smith, Sheriff of Midland County, who had him in custody, by the promise of said sheriff that he would be put on probation, to waive preliminary examination. After 5:00 P.M., he was hurried before a justice of the peace and charged with the crime of entering the private apartment of Ira Smith of the City of Midland with intent to commit a felony, to-wit, larceny. By reason of the promises and persuasion of the sheriff and without having been permitted to obtain counsel or to consult with his wife, who resided with him in Midland, he waived preliminary examination and was bound over to the Circuit Court for trial (R. 9).

He was not informed of the nature of the charge against him, but was told by the sheriff that it was merely larceny of a rifle, and, upon the basis of this belief, he waived preliminary hearing. From that time to 7:00 P.M., he was held in confinement without being permitted to communicate with his wife or an attorney and was then brought before the Honorable Ray Hart, Circuit Judge, and arraigned, and an information was read to him (R. 19) and he was informed by the court that the charge was larceny from a private apartment entering a private apartment with intent to commit a larceny, that is, to steal (R. 20). He then pleaded guilty.

He was then taken to the jail at Bay City, Michigan and there confined up to the time of his trial. During this confinement, he was informed by Hiram A. Nicholson, probation officer to whom the case has been referred, that, since he was a first offender, he would be put on probation, and he was persuaded by Ira H. Smith not to communicate with A. W. Richter of Milwaukee, an attorney with whom he was acquainted, and not to engage any attorney. He continued under the belief that he was charged merely with larceny of a rifle.

The wife of petitioner was informed by the sheriff on January 18, 1943, that her husband had pleaded guilty to the offense of stealing a rifle, and the sheriff persuaded her not to obtain counsel for her husband, and dissuaded her from speaking to the Circuit Judge by informing her that this would be harmful to her husband's case, and persuaded her that her husband would be put on probation (R. 12).

The probation officer likewise informed petitioner's wife that her husband had pleaded guilty to stealing a gun; and, that as a first offender, he was quite certain that he would be put on probation and advised her not to engage a lawyer (R. 13). On January 21, the sheriff called for petitioner's wife and drove her to the Bay City jail and again cautioned her not to engage an attorney and assured her that her husband would be put on probation. On January 23, she visited her husband in jail and he told her to return to Milwaukee and consult A. W. Richter and to retain him to appear for him in the action. She communicated this to the probation officer who advised her not to go to Milwaukee and not to obtain an attorney and assured her that her husband would be put on probation. On January 26, she went to jail in Bay City to visit her husband and was informed that he had been taken to court at Midland, and, on the

evening of that day, the sheriff brought her husband to her living apartment and informed her of his conviction, and that he was then taking him to the state prison at Jackson, Michigan.

On January 26, petitioner was brought before the Court for sentence he was not represented by counsel and was not advised by the Court that he had the right to be so represented. No further information was given him as to the nature of the charge (R. 21), and he was sentenced to imprisonment for a minimum term of four years and ten months under a statute by the terms of which the maximum sentence is five years. He is now serving this sentence in the State Prison for Southern Michigan at Jackson, Michigan.

A petition for leave to file a motion for new trial was filed in the Circuit Court setting forth these facts (R. 8 et seq.). An answer to the petition was filed by the assisting prosecuting attorney (R. 14) containing argumentative matter but not denying the specific allegations of the petition. An affidavit of the sheriff was also filed denying generally the allegations of petitioner and denying that defendant asked permission to employ counsel and that the sheriff made any promises to the wife of the petitioner or advised her not to procure counsel. The sheriff also denied that he had anything to do with the searching of petitioner's home in Wisconsin.

Upon a hearing before the Court (R. 17), without taking evidence, and merely upon its own statement as to petitioner's ability and knowledge, and the statement as to what the Court claimed he had ascertained by private examination of petitioner, denied the motion. Petition for leave to appeal from the denial of the motion was filed in the Supreme Court of Michigan (R. 1) and was denied June 30, 1943 (R. 22). Petition for rehearing was filed and was denied by the Supreme Court October 5, 1943 (R. 23).

QUESTIONS PRESENTED

The case presents the question whether a conviction in a case in which defendant has been prevented by state officers from securing counsel and has been induced by persuasion and promises to waive preliminary hearing and to plead guilty and has been misinformed of the nature of the offense and has not been informed by the Court of his constitutional right to counsel, and has not been adequately informed by the Court of the nature of the charge and where evidence obtained by illegal search has been used by the Court in arriving at a judgment and where the alleged political beliefs of the defendant have influenced the judgment of the Court is valid under the Fourteenth Amendment of the Constitution of the United States.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The Supreme Court of the State of Michigan, a Court of last resort, has decided a federal question in a way in conflict with applicable decisions of this Court.

Smith vs. O'Grady, 312 U.S. 329, 61 Sup. C. 572, 85 L. Ed. 859.

Walker vs. Johnston, 312 U.S. 275, 279 et seq., 85 L. Ed. 930, 61 Sup. C. 574.

Cochran vs. Kansas et al., 316 U.S. 255, 86 L. Ed. 1453, 62 Sup. C. 1068.

Powell vs. Alabama, 287 U.S. 45, 57, 77 L. Ed. 159, 53 Sup. C. 55.

Lisenba vs. California, 314 U.S. 219, 236, 86 L. Ed. 166, 179, 62 Sup. C. 280.

Anderson vs. U. S., 318 U.S. 350, 87 L. Ed. 589, 63 Sup. C. 599, 602.

McNabb vs. U. S., 318 U.S. 332, 87 L. Ed. 579, 585, 63 Sup. C. 608, 614.

Betts vs. Brady, Warden, 316 U.S. 455, 86 L. Ed. 1595, 62 Sup. C. 1252.

Chambers vs. Florida, 309 U.S. 227, 84 L. Ed. 716, 60 Sup. C. 472.

Johnson vs. Zerbst, 304 U.S. 458, 82 L. Ed. 461, 58 Sup. C. 1019.

Avery vs. Alabama, 308 U.S. 444, 84 L. Ed. 377, 60 Sup. C. 321.

Waley vs. Johnston, 316 U.S. 101, 62 Sup. C. 964, 86 L. Ed. 1305.

Wherefore, it is respectfully prayed that a writ of certiorari be issued out of, and under the seal of, this Honorable Court directed to the Supreme Court of the State of Michigan commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and that the judgment of the said Supreme Court of the State of Michigan may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioner will ever pray.

Respectfully submitted,

HERBERT OTTO SCHUCHARDT,
Petitioner.

A. W. RICHTER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

JURISDICTION

The jurisdiction of this Court is invoked under Judicial Code, Section 237-b, as amended by the Act of February 13, 1925, and March 8, 1934, 28 U.S.C. 344-b.

The date of the final judgment in the trial court is January 26, 1943. Application for leave to appeal was denied by the Supreme Court of Michigan on June 30, 1943. Petition for rehearing was filed and was denied on October 5, 1943.

The nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237-b, supra. The claims of federal constitutional right were specifically raised and set up by the petition for leave to file a motion for a new trial in the trial court and upon the hearing had upon said petition, (R. 8, 17) and the trial court denied such claims of federal constitutional right. The Supreme Court of the State of Michigan by refusing leave to appeal, which was required under the statutes of Michigan, affirmed said denial of petitioner's constitutional rights upon which his petition for leave to appeal was based and by denying leave to appeal and denying a rehearing from such denial passed adversely upon petitioner's claims of constitutional right and overruled the same. The federal rights claimed by petitioner are that he was denied due process of law as guaranteed by the Fourteenth Amednment of the Constitution of the United States in that he was illegally imprisoned without being brought before a magistrate as required by the statutes of the State of Michigan, was prevented from obtaining counsel or communicating with his relatives or friends, was illegally induced by persuasion, promises

and false statements of officers of the State of Michigan to waive preliminary examination, was induced by persuasion and false promises of such officers to plead guilty to the offense charged, was not informed by the court of his right to have counsel and was convicted upon his plea of guilty without the aid of counsel, was not informed by the court of the nature of the offense with which he was charged and was not able to comprehend the same, was induced by improper means to sign a paper, the nature of which is not known but which is claimed to have been an authorization for the search of his home in Wisconsin, was convicted without the introduction of any evidence and without being furnished with a copy of the information containing the charge against him, was convicted upon evidence obtained by an illegal and unconstitutional search of his home and upon alleged hearsay statements and reports, not produced upon the trial, of his alleged political beliefs.

Relief was sought by application for new trial and by petition for leave to appeal from the denial thereof because no other method is available under the law of Michigan to obtain relief.

In re Offil, 293 Mich. 416, 292 N.W. 352.

The following cases among others sustain the jurisdiction of this Court:

Smith vs. O'Grady, 312 U. S. 329, 61 Sup. C. 572, 85 L. Ed. 859.

Ward vs. Texas, 316 U. S. 547, 86 L. Ed. 1663, 62 Sup. Ct. 1139.

Avery vs. Alabama, 308 U. S. 444, 84 L. Ed. 33, 60 Sup. Ct. 321.

II.

STATEMENT OF THE CASE

As appears from the petition for certiorari, supra, petitioner was arrested by state officers in Midland, Michigan, and was held without being permitted to obtain counsel or to communicate with his wife, who was the only relative and friend whom he had in the vicinity, from 1:00 P. M. to 5:00 P. M. During that time he was persuaded and induced to waive preliminary examination and after 5:00 P. M., was taken before a justice of the peace and waived examination by reason of the persuasion and promises of the officers. He was then again confined without being permitted to obtain counsel or communicate with anyone until 7:00 P. M. when he was taken before a Circuit Judge and arrainged upon an information, which had been drawn in the meantime, and which charged the statutory crime of entering without breaking with intent to commit a felony. Petitioner was foreign born and unfamiliar with court procedure and legal terminology and did not understand the nature of the offense. He had been informed by the sheriff that he was charged with stealing a rifle, which would have been larceny under the statutes of Michigan and, if the value of the rifle was not over fifty dollars, it would have been simple larceny, a misdemeanor.

Petitioner had been informed by the sheriff that if he would plead guilty he would be placed on probation. By reason of such promise petitioner pleaded guilty. He was not at that time nor at any time during the entire proceeding informed by the Court of his right to have counsel. This fact is not denied anywhere in the record.

After the plea of guilty, he was confined in jail in another city and was not informed of his right to be enlarged on bail, although he had the financial ability

to furnish bail. During this confinement, the sheriff continued to dissuade him from obtaining counsel and also persuaded his wife not to obtain counsel for him and assured her that he would be put on probation. By reason of this persuasion, petitioner's wife, who intended to obtain the assistance of petitioner's present counsel, refrained from obtaining legal assistance for him. The probation officer, to whom the case had been referred, assured petitioner and his wife that petitioner would be put on probation and persuaded them not to engage counsel. This is not denied in the record.

Eleven days after the entry of the plea of guilty, petitioner was brought to trial without the knowledge of his wife. Upon the trial, he was not informed by the Court of his right to have counsel and the nature of the offense was not explained to him in such manner as was readily comprehensible to a layman of petitioner's intelligence and qualifications and he was convicted without the introduction of any evidence and sentenced to a term of imprisonment in the penitentiary of from four years and ten months to five years.

The record shows that someone evidently with the knowledge and consent of the state officers entered petitioner's home in the State of Wisconsin and took from it numerous article of personal property. It was claimed that the search was made pursuant to a waiver signed by petitioner but not such document and no search warrant is contained in the record and the sheriff disavows any connection with the search. It is also claimed that a gun was found in his home, and the Court refers to the gun, but no gun was offered in evidence. Petitioner alleges that he was persuaded, induced and forced to sign some sort of a paper with reference to a search but he does not know the nature of it.

The Court refers to statements by various persons obtained by the probation officer in Wisconsin to the effect that petitioner had made statements indicating that he was in favor of the German Government. The extremely severe sentence given to petitioner, who was a first offender, for a comparatively minor offense can be explained only by the effect which the extraneous matter concerning petitioner's political beliefs had on the mind of the Court. The sentence was for a minimum of four years and ten months under a statute in which the maximum is five years.

Petitioner asserts that he is innocent of the crime with which he was charged, that he did not enter any private apartment for the purpose of committing a felony and that he did not steal any gun from any private apartment.

III.

OPINION BELOW

The Supreme Court of Michigan in denying the application for leave to appeal and in denying the application for a rehearing filed no opinion (R. 22, 23). The Circuit Court denied the application for a new trial on the ground that it was convinced from the judge's private examination of the petitioner that his plea of guilty was uninfluenced and was understood by him. (R. 17).

IV.

ERRORS TO BE ASSIGNED

The Supreme Court of Michigan erred in denying the only method of relief available under the law of that State to correct the erroneous judgment of the Circuit Court, by which Petitioner's Constitutional right to due process of law was denied.

V.

ARGUMENT

A.

Illegal Detention.

It is undisputed in the record that Petitioner was arrested at 1 P.M., was not taken before a magistrate, but was detained in a room in the custody of the Sheriff and other State officers and was sweated and third-degreed from the time of his arrest to 5 P. M. without being permitted to obtain counsel, or to communicate with his wife or anyone else. (R. 7). During this time he claims that he was induced to waive preliminary examination and to plead guilty against his will.

At 5 P. M. he was rushed before a Justice of the Peace, again without the opportunity of consulting counsel, and waived preliminary examination according to plan.

Under the statutes of Michigan it was the right of Petitioner to be brought before the most convenient magistrate without delay.

Sec. 17147 and
Sec. 17160, Compiled Laws of Michigan.
Linnen vs. Banfield, 114 Mich. 93, 72 N.W. 1.

It is not contended that a Justice of the Peace was not readily available in the City of Midland, and the fact that he was found as soon as the officers had completed their work on Petitioner and were ready to take him before the Justice, shows that he was available. Therefore, under the provisions of

Sec. 17193, Compiled Laws of Michigan,

he was entitled to prompt examination. This was denied him for the purpose of carrying out the design of the Sheriff and other Officers to prevail upon him to waive preliminary examination and to plead guilty.

Under the laws of Michigan it was also the right of Petitioner to have counsel at the preliminary examination.

Sec. 17204, Compiled Laws of Michigan.

It is not contended that he was apprised of this right, and petitioner alleges that he was effectively prevented from having counsel by the persuasion, influence and promises of the Sheriff. He states that he was informed during the illegal inquisition that he would not be permitted to leave the room, or to obtain a lawyer, or to get legal advice until he had signed a confession and that this statement was made by the Assistant Prosecuting Attorney in charge of the case. (R. 7). This statement is not specifically denied by the prosecuting attorney. (R. 14).

After the preliminary hearing he was again incarcerated and not permitted to communicate with anyone, even his wife. At 7 o'clock the extraordinary step was taken of calling the Circuit Judge to the Court House at this unusual hour, obtaining two court reporters and bringing the petitioner into court to obtain his plea of guilty. These unusual facts in themselves arouse suspicion as to the fairness of the procedure. He was not informed by the Circuit Judge of his right to have counsel, nor was he so informed at any time throughout the entire proceeding. He was a comparative stranger in the community, having worked there for but a short time; he was of foreign birth, entirely unfamiliar with court procedure and legal terminology, and had never been in a court except at the time of his naturalization. He was not only not informed of his right to have counsel,

but he was not adequately informed of the nature of the charge against him in the information which had been hurriedly prepared between the time of the examination and the convening of court and of which he did not receive a copy.

The charge was entering a private apartment without breaking, without intent to commit a felony, to-wit, with intent to commit larceny. This is a form of statutory burglary. Instead of explaining to this helpless and uninformed defendant the nature of the offense, the Judge, after having the information read, which, no doubt, gave little information to the defendant, because framed in technical terms, merely stated that the charge was larceny from a private apartment with intent to commit a larceny, that is, to steal. Not a word was said as to the fact that this was a felony and as to what a felony is, not a word was said as to the penalty, but the thought was conveyed that it meant stealing. (R. 20).

The illegal confinement in violation of the State law and the deprivation of the right to communicate with relatives and the failure to promptly bring the defendant before a magistrate for preliminary examination and the failure to apprise defendant of his right to counsel at the preliminary examination, as provided in the State law, are in themselves violations of the federal rights guaranteed by the Fourteenth Amendment of the Constitution of the United States, sufficient to invalidate the conviction which followed these practices.

Ward vs. Texas, 316 U.S. 547, 552, 62 Sup. C. 1139, 86 L. Ed. 1663.

Smith vs. O'Grady, 312 U.S. 329, 61 Sup. Ct. and 85 L. Ed. 859.

As will be shown the vice of the practice continued throughout the proceeding and deprived Petitioner of the rudiments of a fair trial.

B.

Deprivation of the Right to Counsel.

The right to counsel in a criminal proceeding is guaranteed by the Constitution of the State of Michigan.

Constitution of Michigan, Article II, Sec. 19.

And it has been held by the Supreme Court of Michigan that the failure to inform defendant of this constitutional right is ground for reversal.

People vs. Pisoni, 233 Mich. 462, 465, 206 N.W. 986, 987.

This petitioner, a foreigner, unfamiliar with court procedure and ignorant of his rights, was not advised at any time by the court of his constitutional right to have counsel.

The proceedings upon the acceptance of the plea of guilty are set forth verbatim in the record. (R. 18). So also the proceedings at the time of the trial are likewise set forth verbatim. (R. 21).

Upon neither occasion did the court mention by even a word defendant's right to be represented by counsel. He was not informed that he was entitled to counsel, he was not asked whether he wanted counsel, nor did he in any manner waive the right to have counsel. All this is not denied anywhere in the record.

It is plainly apparent how important the right to have counsel was to this Petitioner in view of the fact that he was never furnished with a copy of the information, that the trial which was had, was without evidence and without any opportunity of confrontation of any witnesses.

It is submitted that under the law of this Court, this failure of the trial court to give the defendant this im-

portant right, in itself, invalidates the judgment and sentence.

Powell vs. Ala., 287 U.S. 45, 57, 77 L. Ed. 159.

However, not only was the defendant not informed of his constitutional right to have counsel, but, as he alleges, he was dissuaded by the sheriff and by the probation officer, from obtaining counsel. He states that he was "informed by the Sheriff that he was merely charged with stealing a rifle and that he would be put on probation and that he should not obtain counsel". While the Sheriff, in an affiadavit, which was filed in answer to the motion for a new trial, denies by general statements these charges of the petitioner, there is no specific denial of the facts stated by petitioner and his wife. It is submitted that these general denials of the Sheriff have little credibility in view of all the facts. It is not reasonable to assume that a defendant, if he understood that he was facing a serious felony charge and if he knew that he could have the assistance of counsel, and having the financial ability, which defendant had, would voluntarily deprive himself of the important aid of counsel. However, the trial court, upon the petition for leave to file application for a new trial, failed to permit the introduction of evidence, did not permit the petitioner to be brought to court and dismissed the application summarily. (R. 21).

This Court makes an independent examination of the record and decides for itself the credibility of the testimony.

Lisenba vs. California, 314 U.S. 219, 237, 86 L. Ed. 166, 179, 62 Sup. C. 280.

Avery vs. Alabama, 308 U.S. 444, 446, 84 L. Ed. 377.

As bearing upon the general denials of the sheriff, attention is called to two cases coming from the same Circuit Court as the present case in each of which it was alleged that Smith, who carried out the plan in this case to induce petitioner to plead guilty, made the same promise to the defendants which he made to the petitioner, that is, that they would be placed upon probation and caused them not to obtain counsel and to enter pleas of guilty against their will; and the same Circuit Judge denied the motions for new trial.

People vs. Severn, 303 Mich. 337, 6 N.W. 2d 536.
People vs. Vasquez, 303 Mich. 340, 6 N.W. 2d. 538.

Surely it is not merely a coincidence that defendants in this same Court who have been found guilty upon their pleas of guilty and who have not been represented by counsel allege that they were induced to plead guilty and not to employ counsel by the sheriff and that the same Circuit Judge habitually denies motions for new trial and thus prevents the possibility of establishing the illegal practice of this sheriff. Not only is grave doubt cast upon the credibility of the sheriff's general denials, especially in this case where the probation officer makes no denial, but the suspicion arises that there is an habitual perversion of justice in criminal cases in the circuit court in which petitioner was tried.

It is submitted that under the rule of this Court petitioner has been deprived of his federal constitutional rights with reference to the aid of counsel and that it was the duty of the trial court, upon the showing made by Petitioner, to examine into the facts to adequately determine whether the allegations were true.

Powell vs. Ala., 287 U.S. 45.
McNabb vs. U.S., 318 U.S. 332.

Anderson vs. U.S., 318 U.S. 350.

In the absence of such examination by the trial court, the denial of any relief by the Supreme Court of Michigan was error, which resulted in the final loss of petitioner's constitutional rights.

C.

The Plea of Guilty Induced by Persuasion and Promises by State Officers Deprived Petitioner of His Constitutional Rights.

The application for a new trial alleges that petitioner was induced against his will by the persuasion of the Sheriff, not only to waive preliminary examination, but to plead guilty, and, that he was deceived by the statement of the Sheriff that the offense with which he was charged was merely larceny. If this statement had been true and if the charge had been merely larceny, unless the larceny consisted of property of the value of more than Fifty ($50.00) Dollars, the charge would have amounted merely to a misdemeanor and the penalty could not have been more than imprisonment, not in a penitentiary, but in jail for a period of three months. Sec. 28.588 Stat. Ann., Sec. 16, 899 Compiled Laws 1929; Sec. 28.772 Stat. Ann. Sec. 16, 589 C. L. 29. As it is, there is grave question of the sufficiency of the information, which charges entry without breaking, with intent to commit a felony, to-wit, larceny, without charging the value of the subject of the larceny. However, it is very clear that it was very easy to mislead this ignorant, inexperienced petitioner into believing that the charge was simple larceny and not a felony. Even if the defendant had stolen a rifle, if he did not enter a private apartment in order to do so, he would not have been guilty of this serious offense;

however, it is to be noted that he swears that he was innocent of the offense and that he did not enter a private apartment and did not steal a gun. However, in spite of these allegations, the trial court failed to give a hearing and to permit testimony to be introduced which would have established their truth or untruth.

In addition to the allegations of petitioner that he was dissuaded by the Sheriff from obtaining counsel and was induced by promises and deception to plead guilty, the wife of petitioner swears (R. 12) that she was persuaded by the Sheriff not to engage counsel for her husband and that the sheriff informed her that her husband was charged merely with larceny and that, inasmuch as he was a first offender, he would be put on probation, and, that, by reason of such statements, she refrained, against her will, from obtaining counsel for her husband. She states further in her affidavit that she was also persuaded by Hiram A. Nicholson, the probation officer, who was in charge of the case, not to engage counsel for her husband and was promised that her husband, being a first offender, would be put on probation. Nowhere in the record, are these statements denied; in fact, no affidavit was filed by the probation officer in reply to these charges. They, therefore, stand as verities in the case, and yet, upon these undenied allegations, which clearly invalidated the judgment and sentence, the trial court refused to award a new trial and the Supreme Court of the State refused to even permit the appeal. It is submitted that these facts clearly bring the case within the rule of this court in:

Smith vs. O'Grady, 312 U.S. 329.

Therefore, it is submitted that the order of the Supreme Court of Michigan, denying the appeal, should be reversed and a new trial should be awarded.

The Circuit Court decided the application for new trial solely on the petition, the supporting affidavit and the so-called answer of the assistant prosecuting attorney and the affidavit of the sheriff. It refused to receive testimony and to have the petitioner produced for a hearing. In view of the allegations of the petition and the complete absence of denials of the facts as to wrongful detention of the petitioner prior to preliminary examination and the fact as to misrepresentation by the sheriff of the nature of the offense with which petitioner was charged and of the charges made against the probation officer as to misrepresentation of the offense and persuasion not to engage counsel, it is submitted, that fairness required a hearing with the full means of ascertaining the truth; which could be achieved only by the production of the prisoner and the testimony of his witnesses. The petition and the supporting affidavits give a picture of a plot to deprive petitioner of the most basic constitutional rights guaranteed to one charged with crime by the federal constitution and the accomplished result of producing a conviction of a helpless and unaided prisoner by fraud. What has been said with reference to the federal practice upon habeas corpus in cases of this kind is applicable to the situation here.

> *Walker vs. Johnston,* 312 U.S. 275, 285, 85 L. Ed. 830, 61 Sup. C. 574.
>
> *Holiday vs. Johnston,* 313 U.S. 342, 353, 85 L. Ed. 1393.
>
> *Waley vs. Johnston,* 316 U.S. 101, 62 Sup. C. 964, 86 L. Ed. 1305.

Here the issue as to whether the prisoner has been deprived of his fundamental constitutional rights has not been passed upon by judge or jury so as to ascertain the truth.

> *Lisenba vs. California,* 314 U.S. 219, 236, 86 L. Ed. 166, 179, 62 Sup. C. 280.

Therefore, the order of the Supreme Court of Michigan in affirming the action of the trial court in denying a new trial without granting an adequate hearing to ascertain the truth of the very serious charges made in the application, is a denial of those basic rights which inhere in due process of law as guaranteed by the federal constitution in criminal cases. It is, therefore, submitted, that the order of the Supreme Court of Michigan should be reversed and a new trial should be ordered.

D.

Remedies Under State Law Exhausted.

Cases analogous on the facts to the present case decided by this Court generally come up on habeas corpus. The requirement that petitioner must exhaust the legal remedies available under the law of the state,

> *Mooney vs. Holohan,* 294 U.S. 103, 115; 55 Sup. C. 340, 79 L. Ed. 791

has been fulfilled here.

Under the law of Michigan, habeas corpus is not available to obtain relief in the case of a plea of guilty obtained by deception.

> *In re Offil,* 293 Mich. 416, 292 N.W. 352.

Therefore, there was no other remedy except to apply for a new trial and upon denial of that application to file application in the Supreme Court of Michigan for leave to appeal from such denial. Appeal in a criminal case is not a matter of right in Michigan.

> *Sec. 17, 368 Compiled Laws 1929,* Section 28.1100 Stat. Ann.

Therefore, application for leave to appeal was the only procedure to which petitioner could resort and denial of

that application deprived him of any possible relief under the law of the State of Michigan.

It is, therefore, submitted, that the only relief now available to the petitioner and the only means of preventing the execution of the judgment and sentence based upon the deprivation of his constitutional rights is by means of this application to this Court for writ of certiorari.

E.

Articles Obtained by Illegal Search Used Upon the Trial.

Petitioner's application for a new trial sets forth that his home in Milwaukee County was entered without the knowledge of either himself or his wife and a large number of articles of personal property were taken therefrom and, while not introduced in evidence, were considered by the Court in passing judgment (R. 11). He alleges further that he was induced to sign a statement claimed to be a permission for the search of his home. No such statement appears in the record nor was any search warrant issued upon the basis of any such statement. However, it is not denied that such a search took place and that articles of petitioner's property were brought to the Court in Michigan. The assistant prosecutor, in his answer to the petition, evades any mention of the matter (R. 14), and the sheriff in his affidavit (R. 16) seeks to evade responsibility for the acts, while admitting that a search was made and claiming that a gun was found. He says "that at the time the home of said defendant was searched in Wisconsin and the gun was found, this Deponent had nothing to do with the procuring a consent from said defendant or the search of said premises". Thus, while the sheriff inferentially admits that no legal search was made, yet he

insists that a gun, of which the defendant knows nothing, was found. Nevertheless, apparently a gun claimed to have been found in petitioner's home in Wisconsin was brought into Court, although no evidence was taken at the trial, and other articles illegally removed from petitioner's home were also brought to the knowledge of the Court and entered into the considerations which led to the judgment of the Court and the sentence of petitioner.

Thus, this petitioner, ignorant of his rights, who had not been informed at any stage of the proceedings by the Court or anyone else of his right to counsel, who did not understand the nature of the charge against him and had not received an adequate explanation of it, from the Court, and who had been deceived as to its nature by the sheriff, as is not denied, was not only convicted without the introduction of the evidence but was convicted by reason, at least in part, of matters influencing the mind of the Court which were obtained in violation of his fundamental constitutional rights.

F.

Alleged Political Beliefs Influenced the Court.

Petitioner alleges for application for new trial (R. 11) that the Court was influenced by many unverified reports, hearsay statements and gossip and that he was not informed of the nature of such reports and statements. This allegation is no where challenged in the record. The answer of the assistant prosecuting attorney contains no reference to it, although it does contain the veiled statement, evidently, referring to the matter, that petitioner "even at this time, believes that he is safer in Jackson Prison, then he might be if released"; which evidently refers to the rumors and statements that he had expressed himself favorably to the Nazi govern-

ment. The trial judge makes no mention of this allegation (R. 17) and does not take issue with the claim that he was influenced by such reports and statements.

The allegation, therefore, stands undenied and gives ground for the inference that the alleged political beliefs of petitioner had to do with the judgment of the Court and were a factor in producing the unusually severe and harsh sentence which the court meted out to this first offender for a crime which was not of a very serious nature and certainly did not indicate any criminal tendency. Thus, it can readily be inferred that petitioner is really being punished for alleged political beliefs which the trial judge thought he entertained. Thus, there is involved the infringement of a right as basic as any which our constitution guarantees.

> *Schneiderman vs. U. S.*, 319 U.S. —, 63 Sup. C. 1333, 1343.

In these times the subtle influence of the unfounded suspicion of disloyal beliefs is apt to pervade even the sacred precincts of justice. When it does it may be completely subversive of the high purpose of the instrumentalities which administer justice. It can readily produce the result of shocking punishment for doubtful infractions and oblivious disregard for the most sacred rights of the individual.

SUMMARY

Upon the record it appears without denial that petitioner was illegally detained and imprisoned in violation of the state law without being brought before a magistrate for an examination; that he did not have counsel and was prevented from communicating with anyone and, during this time was sweated and third-degreed; he claims that he was induced to waive pre-

liminary examination by misrepresentation as to the nature of the offense, by persuasion that this was his best course and by promises that he would be put upon probation; that at the conclusion of this sweating he was immediately taken before a magistrate and, without being advised of his right to counsel as provided by the state law, he waived preliminary examination; he was again confined without being permitted to communicate with anyone and within less than two hours was arraigned before the Circuit Judge, and, without being advised of his right to counsel and without proper explanation of the nature of the offense, his plea of guilty was accepted; he alleges further that he was kept in jail from that time to the time of his trial, was never given the opportunity to be enlarged on bail although he had ability to furnish bail, and was dissuaded by the sheriff from obtaining counsel and was promised that he would be put on probation if he would plead guilty, and that his wife was induced by the sheriff not to engage counsel and not to attempt to speak to the Circuit Judge, that his wife was never informed of the court proceedings and was not present in court at any of the proceedings; the persuasion, promises and influence of the probation officer upon the wife are not denied in the record; it appears from the record that petitioner was convicted without the introduction of evidence, without being advised of his right to counsel and without adequate explanation of the offense and without the aid of anyone, even his wife, who was not informed of the time of the trial, which was held without previous notice; that he did not understand the nature of the offense and was deceived into believing that it was simple larceny and that his wife was deceived into the same belief; he was given the extremely harsh and unusual sentence in view of the fact that he was a first offender, which is not denied, of four years and ten months under a statute pro-

viding a maximum of five years; an illegal search of his home in Milwaukee County was carried out upon a purported authorization which was not of record in court and articles obtained in such search, although not introduced in evidence, were brought to court and entered into the considerations of the Court in reaching a judgment; that hearsay statements and gossip as to alleged political beliefs of petitioner were considered by the Court and prejudiced it; that the trial court, without permitting the introduction of evidence and without the production of petitioner in Court, denied the application for a new trial; that the Supreme Court of Michigan denied the application for leave to appeal, which is required by the state law, and denied an application for rehearing.

It is submitted, that definite and gross deprivation of petitioner's constitutional rights under the Constitution of the United States has been shown.

Respectfully submitted,

A. W. RICHTER,
Attorney for Petitioner.

(2)

United States of America

In the Supreme Court of the United States

October Term 1943

No. 573

HERBERT OTTO SCHUCHARDT,
Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN

Brief Opposing Petition for Writ of Certiorari to Supreme Court of the State of Michigan

Herbert J. Rushton,
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HERBERT OTTO SCHUCHARDT,
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v.

THE PEOPLE OF THE STATE OF MICHIGAN

Brief Opposing Petition for Certiorari.[1]

I.

Question Presented.

As defined by petitioner's counsel (p. 5), the question presented is

> "whether a conviction in a case in which defendant has been prevented by state officers from securing counsel and has been induced by persuasion and promises to waive preliminary hearing and to plead guilty and has been misinformed of the nature of the offense and not been informed by the court of his

---

[1] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

constitutional right to counsel, and has not been adequately informed by the court of the nature of the charge and where evidence obtained by illegal search has been used by the court in arriving at a judgment and where the alleged political beliefs of the defendant have influenced the judgment of the court is valid under the Fourteenth Amendment of the Constitution of the United States".

Our objection to the foregoing statement is that the record does not sustain the premises of the question propounded.

II

Basis of Jurisdiction.

We take the position that the rulings below do not bring the case within the jurisdictional provisions of the Judicial Code, § 237-b, as amended (28 USC, § 344-b).

1. The claims of federal constitutional right were not specifically raised and set up by the petition for leave to file a motion for new trial in the circuit court (8).

2. Since no specific federal constitutional rights were there asserted (5-6), the Supreme Court of the State of Michigan by refusing discretionary leave to appeal,[2] did not affirm a denial of such rights.

---

[2]

The Michigan Code of Criminal Procedure (Chapter 10, § 3 [3 Comp. Laws 1929, § 17357 Stat. Ann. § 28.1100]) provides:

"Sec. 3. Writs of error in criminal cases shall issue only in the discretion of the supreme court or any justice thereof, on proper application therefor".

III

Counter-Statement of the Case.

We are unable to accept counsel's 'Summary Statement of Matters Involved' (petition, pp. 1-4) or his 'Statement of the Case' (petition, pp. 9-11), and we note the following errors therein:

1. These statements seem to proceed on the theory that the trial court was bound to accept as true the allegations set forth in petitioner's application for leave to file a motion for new trial. Such allegations were denied by counter-affidavits (14-17).

2. It is said (petition, p. 2) that during the time petitioner was kept in a room by the sheriff, 'he was continuously interrogated by the assistant prosecuting attorney of Midland county, the sheriff and other officers' (7).

> "He was not permitted to obtain a lawyer, and was informed that he would not be permitted to leave the room until he had signed a confession, and was intimidated and threatened to a point where he was not able to exert his own will power".

This statement is based upon an affidavit of the petitioner (7), in support of his petition for leave to file a motion for a new trial.

But this affidavit was signed and verified in Jackson, Michigan, on the day the petition was denied, and it was

not filed with the court until the day after the petition had been denied (See, supplemental record).

Counsel has been gracious enough to stipulate to the foregoing fact, and to agree that the assistant prosecuting attorney may file a counter-affidavit.

It now appears from the affidavit of the assistant prosecuting attorney that he was not present in the room to which petitioner was confined, and that he did not participate in questioning him (See, supplemental record).

3. It is alleged that petitioner was not informed of the nature of the charge against him (petition, p. 2), but the record of the proceedings before the circuit judge clearly indicates that the nature of the charge was explained by the trial judge, and the information itself was read to petitioner (18-21). Petitioner expressed a desire to plead guilty:

> "**The Court**: I have been informed also that you desire, that you want to plead to the information that is filed against you by the prosecutor?
>
> **Mr. Schuchardt**: Yes, sir.
>
> **Court**: Then you want to come in and plead to the charge as I understand it and not wait any longer. That is your desire?
>
> **Mr. Schuchardt**: Yes." (19).

The court then advised petitioner to 'listen carefully to the prosecutor as he reads the complaint (information) and see that you understand it thoroughly and know what it is and then I will ask you to plead. The prosecutor

will read the information to you and then see that you understand it thoroughly' (19).

Whereupon the prosecuting official read the information to the petitioner (19-20), and the court inquired if petitioner understood 'the charge made against you', and he replied, 'Yes, sir' (20).

> "**The Court:** The charge is larceny from a private apartment, entering the private apartment with the intent to commit a larceny, that is to steal. You understand the charge?
>
> **Mr. Schuchardt:** Yes.
>
> **Court:** If you desire to plead guilty to the charge and you know about that, you will simply say that you are guilty. If not and you want to stand trial, you plead not guilty, and go before the jury. If you don't plead guilty or not guilty, and you, what they say stand mute, the court will enter a plea of 'Not Guilty' on your behalf on the records of the court and then you stand trial. You understand now?
>
> **Mr. Schuchardt:** Yes, I understand.
>
> **Court:** Are you ready to plead?
>
> **Mr. Schuchardt:** I am ready to plead guilty (20).

Then, as an added precaution, the trial judge took the accused to his private office, and, having interviewed him, said:

> "**Court:** I have talked with Mr. Schuchardt privately and I accept his plea of guilty as having been made of his own free will, of his own desire, without

any undue influence, and I will accept his plea'' (20-21).

4. Counsel states that petitioner 'was then taken to the jail at Bay City, Michigan, and there confined up to the time of his trial' (petition, p. 3).

While this fact does not appear of record, we should probably explain that Midland county has no jail (only a police cell), and that its prisoners are accommodated in the county jail at Bay City, only a few miles distant. Moreover, it may be observed that petitioner was not so confined until the time of his 'trial', but having pleaded guilty, he was so imprisoned until the time of sentence.

5. It is said that on January 26

> ''petitioner was brought before the court for sentence he was not represented by counsel and was not advised by the court that he had the right to be so represented. No further information was given him as to the nature of the charge (21) and he was sentenced to imprisonment for a minimum term of four years and ten months under a statute by the terms of which the maximum sentence is five years'' (petition, p. 4).

It should be added that when brought before the court for sentence, the prisoner was asked if he desired 'at the present time to be sentenced' (21), and he replied, 'Yes, sir' (21-22). Asked if there was anything he desired to say before sentence was pronounced, and told that he might speak freely, petitioner replied as follows:

> **''Respondent:** Only I want to say is I am very sorry what I have done.

The Court: What's that?

Respondent: Only I want to say I am very sorry what I have done, and if the court will be lenient with me I will do everything in my power to redeem myself'' (22).

And again, the court explained the seriousness of the charge of 'breaking feloniously in the private apartment of another'. He then pronounced sentence.

6. Counsel claims that on the hearing before the trial judge, on the petition for leave to file a motion for new trial, no 'evidence' was taken. But the record discloses no request to take testimony, and it is apparent that the court was guided by the credibility of the several affiants.

7. In his 'Statement of the Case' (petition, pp. 9-11), counsel asserts that state officers went to Milwaukee, Wisconsin, and there illegally searched the premises of petitioner's home, unlawfully obtaining possession of the stolen rifle. But it should be added that the record does not disclose that the property thus obtained was offered or received in evidence by the court below. No prejudice ensued.

8. It is said:

''The court refers to statements by various persons obtained by the probation officer in Wisconsin to the effect that petitioner had made statements indicating that he was in favor of the German Government. The extremely severe sentence given to petitioner, who was a first offender, for a comparatively minor offense can be explained only by the effect which the extraneous matter concerning petitioner's political beliefs had on the mind of the court''.

There is absolutely nothing in the record to sustain such a statement.

9. Since petitioner's counsel emphasizes the alleged fact that petitioner was denied counsel, and that his federal constitutional rights were infringed, it is permissible to point out that, while petitioner claims to have been greatly shocked at the sentence pronounced upon him, he took no steps to obtain relief under the Michigan code of criminal procedure, until approximately three months and 15 days after judgment. Sentence was pronounced (21-22) on the 26th day of January 1943; and petitioner's application for leave to file a (dilatory) motion for new trial was presented to the court on the 11th day of May 1943 (2).

IV

Reasons for Opposing Allowance of Writ.

We oppose allowance of the writ, on the following grounds:

1st. The Supreme Court of the State of Michigan, a court of last resort on appeal, has not decided a federal question at all, much less has it decided a federal question in conflict with applicable decisions of this court.

2nd. It is manifest that the Supreme Court of the State of Michigan denied leave to appeal, solely on local grounds.

3rd. There is no merit to petitioner's contention that he has been denied any of his rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V

Argument.

Point One

The federal question now presented was not raised in the court below, and the rulings below do not bring the case within the jurisdictional provisions of the Judicial Code.

The petition on file in this cause falls short of presenting a federal question raised in the courts below:

First: Counsel relies upon the provisions of § 237-b of the Judicial Code, as amended (28 USC, § 344-b), the pertinent provisions of which are:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there shall be certified to it for review and determination, . . . any cause wherein a final judgment . . . has been rendered by the highest court of a State in which a decision could be had . . . *where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution* (etc.)".

Where, as in the present instance, a state court has refused to take jurisdiction (grant an appeal), and its judgment does not decide a federal question, the foregoing section does not apply,

Semple v. Hagh, 4 Wall. (71 U.S.) 431.

So, too, this court will not review the judgment of a state court where it is clear that decision was based on other than federal grounds,

Harding v. Illinois, 196 U.S. 78,

and the federal right must have been set up and adjudicated by the judgment of the state court,

Cleveland & P.R. Co. v. Cleveland, 235 U.S. 50.

Such a question is not available here if not presented and ruled upon in the state supreme court, although it was raised in the trial court,

Hiawassee River Power Co. v. Carolina Tennessee Power Co., 252 U.S. 341.

And a writ of certiorari will be dismissed where the record fails to disclose that the complaining party definitely raised the federal question in the state court,

Missouri Pac. R. Co. v. Hanna, 266 U.S. 184.

In order to raise a federal question the federal right must be asserted according to the state procedure,

Louisville & N.R. Co. v. Woodford, 234 U.S. 46.

Second: In his petition for leave to file a motion for new trial in the circuit court (8-12), the petitioner made no mention of the Constitution of the United States, and he asserted no federal rights as such.

Third: Nor did he assert such rights, or raise federal questions in his application for leave to appeal addressed to the Supreme Court of the State of Michigan (1-6).

At the close of that application (5), the petitioner raised certain questions, presented as follows:

> "Respondent further shows that prejudicial error was committed by said court in the trial of said cause and in the denial of the motion for leave to file a motion for new trial and for a new trial, in the following particulars:
>
> **1.** In failing to inform respondent of his right to have counsel for his defense.
>
> **2.** In denying respondent his constitutional right to due process of law by failing to advise him of his right to counsel.
>
> **3.** In adjudging respondent guilty without hearing any evidence.
>
> **4.** In denying respondent's constitutional right against self incrimination by using in evidence articles obtained by illegal search and seizure.
>
> **5.** In basing the judgment and sentence in part on matters not in evidence and on highly prejudicial hearsay statements without affording respondent any opportunity to refute them by evidence.
>
> **6.** In denying the motion for leave to move for a new trial and in denying a new trial" (5, 6).

The Constitution of the State of Michigan provides that in every criminal prosecution, the accused 'shall have the right . . . to have the assistance of counsel for his defense' (article 2, § 19), and that 'the person, houses,

papers and possessions of every person shall be secure from unreasonable searches and seizures' (article 2, § 10).

In absence of reference to the Federal Constitution, the court below would have the right to assume that the 'constitutional rights' to which reference was made were those safeguarded by the State fundamental law.

Our attention has been directed to no authority sustaining the view that, under the Constitution of the United States, an accused person who comes into court with the avowed intent to plead guilty, is entitled to be informed that he is entitled to counsel. The Sixth Amendment merely guarantees the right to 'have the assistance of counsel *for his defense*'.

Nor are we informed concerning any constitutional guarantee that an accused person, when pleading guilty is entitled to have testimony adduced by the State.

There is nothing in the record to show that the trial judge, in pronouncing sentence and admeasuring punishment, was influenced by prejudicial hearsay statements.

And the granting of leave to file a dilatory motion for new trial, lay in the discretion of the court.

Fourth: Since the time had long expired when, under the code of criminal procedure (Chapter 10, § 2 [3 Comp. Laws 1929, § 17356: Stat. Ann. § 28.1099]), a motion for a new trial should have been made, and since the granting of leave to file such a dilatory motion was a matter of grace rather than right,

People v. Hurvich, 259 Mich. 361,

People v. Burnstein, 261 Mich. 534,

it is quite likely that the Supreme Court of the State of Michigan rejected petitioner's application for leave to appeal on that ground.

We, therefore, respectfully submit that the rulings below do not bring the case within the jurisdictional provisions of the Judicial Code.

Point Two

There is no merit to petitioner's contention that he has been denied any rights guaranteed him by the Fourteenth Amendment to the Federal Constitution.

Petitioner's several contentions, 'A' to 'F', inclusive (petition, pp. 12-24), may, in view of the record, be treated summarily.

'A' Allged illegal detention:—Counsel complains that petitioner was held in custody, without warrant, and denied the statutory privilege of being taken before an examining magistrate. The period of such custody was merely four hours, and petitioner was then taken before a magistrate where he waived preliminary examination. He says that he was induced to do so by the sheriff. The answer is 'the law is well settled that the due-process clauses of the Federal and State Constitutions do not require a preliminary examination in criminal proceedings',

People v. McCrea, 303 Mich. 213, 248 (certiorari denied by this Court, 318 U.S. 783), citing

Woon v. Oregon, 229 U.S. 586.

The statement that the prosecuting official was present when petitioner was interrogated, and that he informed the accused 'he would not be permitted to leave the room, or to obtain a lawyer, or to get legal advice until he had signed a confession' (7), is found in petitioner's affidavit; and it is now denied by the prosecuting attorney (see supplemental record).

That the petitioner was fully informed of the nature of the charge, appears from the record of the proceedings before the circuit judge (18-21, and see our statement of the case).

The case does not resemble in any particular,

Ward v. Texas, 316 U.S. 547,

or

Smith v. O'Grady, 312 U.S. 329,

cited in counsel's brief.

In the case of *Ward, supra*, law enforcement officers, acting beyond their authority and in violation of state law, arrested without a warrant an ignorant negro, accused of murder, and took him by night and day to strange towns in several counties; incarcerated him in several jails; and by these means and by persistent questioning, coerced him to confess. The use of the confession at the trial voided the conviction (Syl. 2). The body of the opinion also discloses that the accused 'was beaten, whipped and burned by the officer to whom the confession was finally made'.

Here, we find merely an instance in which an accused person is held for four hours without warrant, 'rushed'

before a magistrate; he waived a preliminary examination, then appears in court and, so far as the court record discloses, voluntarily enters a plea of guilty. When sentenced, he says he is sorry for what he did, and asks leniency on the ground that he will redeem himself (22).

In the case of *Grady, supra,* the accused was tricked into a plea of guilty; after three days in jail, he was taken before a trial judge, 'summarily arraigned, and, upon his prearranged plea of guilty, sentenced, *to his surprise and consternation,* to a term of twenty years imprisonment'.

> "Upon imposition of the twenty year sentence, however, he vigorously protested, asked the court and prosecuting attorney for a copy of the charge to which he had pleaded guilty, and, this request being refused, asked permission to withdraw his plea of guilty, requested appointment of an attorney to advise and assist him, and asked that he be given a proper opportunity to defend himself. All of these requests were refused by the court, and 'within the hour' he was on his way to the penitentiary, accompanied by the sheriff".

In the case at bar, petitioner did not vigorously protest at time of sentence, but expressed his regrets (22).

If surprised and consternated by the sentence imposed upon him, he did not express it at the time but allowed the time within which he might move for a new trial, to go by; and he waited for nearly four [4] months before taking any steps, through his attorney, to obtain relief.

We respectfully submit there is no merit to this contention of petitioner.

'B'. Claimed denial of counsel. Counsel stresses the fact that petitioner was not advised at any time by the court of his constitutional right to have counsel. The Constitution of the United States does not require any such procedure.

And certainly, the facts appearing of record in this case do not even faintly resemble the circumstances disclosed in

Powell v. Alabama, 287 U.S. 45.

'C'. Claim that plea of guilty induced by promises. The gist of the claim, as set forth in the affidavits, is that the accused was told if he would plead guilty he would probably be put on probation. As the Supreme Court of the State of Michigan has observed, 'an accused should not be permitted to speculate upon his sentence and then change his plea after such sentence',

People v. Severn, 303 Mich. 337.

Counsel is mistaken when he intimates that the trial judge, upon hearing the motion for leave to move for a new trial, 'refused to receive testimony and to have the petitioner produced for a hearing'; the record does not bear out this statement.

'D'. Remedies under state law. While, under the law of the State of Michigan, habeas corpus will not be permitted to be substituted for a writ of error,

In re Offil, 293 Mich. 416,

we venture to say, in view of the provisions of Michigan's Constitution (article 7, § 4), that in a case where the pe-

titioner for such a writ alleges that his federal constitutional rights have been violated, the court would be required to consider the petition.

Petitioner's counsel probably took the correct course in applying to the supreme court for leave to appeal; but it does not appear that the highest court of the state decided any question involving a claim of fundamental rights guaranteed by the Constitution of the United States.

'E'. Articles obtained by illegal search. Counsel contends that the alleged illegal search of petitioner's home in Milwaukee, Wisconsin, and the reception of such property (a rifle) in evidence against him, violated his rights under the Constitution of the United States (4th Amendment).

The complete answer is that no property so seized was offered and received in evidence against the petitioner. If it was, the record does not disclose it.

'F'. Alleged political beliefs. Nor does the record reveal that petitioner's alleged political beliefs (in the Nazi form of government), influenced the court.

The record maintains silence on that factor of the case, and petitioner's allegations should not be considered.

VI

Relief Sought.

On the face of this record, we respectfully submit, petitioner is entitled to no relief, and the writ of certiorari should be denied.

Respectfully Submitted,

Herbert J. Rushton,
Attorney General for the State of Michigan

Daniel J. O'Hara,
Assistant Attorney General for the State of Michigan
Counsel for Respondent.

Edmund E. Shepherd,
(Solicitor General for the State of Michigan, Of Counsel on the Brief).

(3)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943

HERBERT OTTO SCHUCHARDT,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

No. 573

PETITIONER'S REPLY BRIEF

A. W. RICHTER,
Attorney for Petitioner.

HAMMERSMITH-KORTMEYER CO. MILWAUKEE

SYNOPSIS OF ARGUMENT

TABLE OF CASES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943

HERBERT OTTO SCHUCHARDT,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

No. 573

PETITIONER'S REPLY BRIEF

The court below necessarily decided a federal question. It denied relief notwithstanding the claim that petitioner was induced by state officers to plead guilty against his will, was prevented by wrongful acts of state officers from having counsel for his defense and evidence obtained by illegal search was used against him. Therefore, the fundamentals of due process of law were denied him.

It is no answer to say that the Supreme Court of Michigan may have decided the case on the ground that the matter of leave to file what is called a "dilatory" motion is a matter of grace. The decision necessarily comprehended the denial of petitioner's federal rights.

Davis vs. Wechsler, 263 U.S. 22, 24; 68 L. Ed. 143.

Under such circumstances this court decides for itself whether there is adequate non-federal ground to sustain the decision.

> *Patterson vs. Alabama,* 294 U.S. 600, 602; 79 L. Ed. 1082, 55 S. C.R. 575.

And it is sufficient if the federal question was so decided by the highest state court, although not considered by the trial court.

> *Hill vs. Smith,* 260 U.S. 592; 67 L. Ed. 419, 43 S. C.R. 219.
>
> *Lawrence vs. State Tax Commission,* 286 U.S. 276, 282; 76 L. Ed. 1102, 52 S. C.R. 556.

And the denial of the federal right raised by petition for reargument is sufficient.

> *Grannis vs. Ordean,* 234 U.S. 385, 392; 58 L. Ed. 1363, 34 S. C.R. 779.
>
> *Chicago R. I. & P. R. Co. vs. Perry,* 259 U.S. 548; 66 L. Ed. 1056, 42 S. C.R. 524.
>
> *Brown vs. Miss.,* 297 U.S. 278, 286; 80 L. Ed. 682, 52 S. C.R. 461.

A federal question was raised in the application for leave to appeal (Tr. 1), not only in the text, but in the assignments of error (Tr. 5). It is also raised in the application for rehearing (which is in the record in this court but was not printed) and it there appears that it was the principal ground relied upon.

> *Saunders vs. Shaw,* 244 U. S. 317, 320; 61 L. Ed. 1163, 37 S. C.R. 638.
>
> *Farmers & Merchants Insurance Co. vs. Dobney,* 189 U.S. 301; 47 L. Ed. 821, 23 S. C.R. 565.

No particular form of words is necessary in raising federal questions below.

Green Bay & Miss. Canal Co. vs. Patten Paper Co., 172 U.S. 58, 67; 43 L. Ed. 364, 19 S. C.R. 97.

The claim of federal right was set forth in petitioner's brief in support of the application for leave to appeal in the statement of questions involved as required by the rules of the Supreme Court of Michigan (Rule 67 Sec. 1). It is submitted that it also appears from the text of the petition for leave to file motion for new trial that the federal questions were necessarily involved and were the principal basis of the application (Tr. 8).

ILLEGAL DETENTION

It is contended that a preliminary examination is not a matter of constitutional right. However, where the involuntary waiver of examination is the result of a plot to induce an involuntary plea of guilty it is an important step in a chain of events.

Ward vs. Texas, 316 U.S. 547, 552; 86 L. Ed. 1663, 62 S.C.R. 1139.

It is stated by respondent that the affidavit of petitioner (Tr. 7), which was sworn to on the day of hearing of the trial court, is now denied by the prosecuting attorney. However, this affidavit was considered by the trial court and was returned to the Supreme Court of Michigan by the trial judge and is part of the record certified to by him (Tr. 6). At the itme when he so certified it as a part of the record, it was not denied. The denial came by the stipulation filed in this court January 24, 1944. The trial court overruled the undenied affidavit.

It is urged that the fact that petitioner did not seek relief for several months after sentence indicates that he

was not surprised and shocked by the sentence. It must be remembered that during all this time he was imprisoned in the penitentiary and hampered from taking prompt action.

HEARING

It is contended that the record does not warrant petitioner's claim that the trial court refused to receive testimony and to have petitioner produced for a hearing upon the motion for new trial. That this was the fact as claimed by petitioner in the Supreme Court of Michigan (See, for instance, Application for Reconsideration of Denial of Leave to Appeal, p. 16, in the record here but not printed) and was never denied by counsel for the People. The fact is, as is common in cases of this type, that much of what occurred could not be gotten into the record. Counsel for petitioner expressly demanded the right to produce testimony and the production of the prisoner at the hearing on June 1, 1943, but the trial judge refused to have the demand and refusal incorporated in the record of the proceedings of that date (Tr. 17).

ILLEGAL SEARCH

It is contended that no articles obtained by illegal search were introduced in evidence. This is true since no evidence was taken. However, the charge that the home of petitioner was rifled (Tr. 14) was not denied by the prosecuting attorney in his answer (Tr. 15, par. 5), but is admitted and affirmed, and the sheriff inferentially admits it but denies his connection therewith (Tr. 17). Nor was there a word of denial by the trial judge in his statement on June 1, 1943 (Tr. 17) that the articles so obtained entered into his consideration in reaching the judgment.

ALLEGED POLITICAL BELIEFS

The same is true as to information contained in statements and reports as to petitioner's alleged political beliefs. Petitioner charged that such matters were used by the court in arriving at a judgment (Tr. 11) and neither the prosecuting attorney nor the trial judge anywhere denied this charge.

Respectfully submitted,

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Attorney for Petitioner.